72-1017

FILE COPY

Supreme Court, U. S.
FILED
20
JAN 29 1973

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1972

No. 72-1017

STATE OF NEBRASKA, GUSTAVE R. LIESKE, Director of Administrative Services of the State of Nebraska, and FRANCES CHRISTENSEN, State Social Security Administrator of the State of Nebraska,

Petitioners.

vs.

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, and ROBERT M. BALL, Commissioner of Social Security of the United States Department of Health, Education and Welfare, and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CLARENCE A. H. MEYER,
Attorney General of Nebraska,
MELVIN K. KAMMERLOHR,
Assistant Attorney General,
State Capitol Building
Room 2119
Lincoln, Nebraska 68509
(402) 471-2211
Counsel for Petitioners.

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

Page

Opinions Below 2

Jurisdiction 3

Statement of Issues Presented for Review 3

Statutory Provisions Involved 4

Statement of Facts 6

Reasons for Granting the Writ of Certiorari

I. The rulings below would interfere with the ability of the state statutorily to define its relationship to public contractors, in that to so define that relation would be to incur social security liability to the United States 10

II. The rules established below to apply to public employment relationships are inconsistent with rules of this court, as stated in United States v. Webb, 397 U. S. 179, to apply to private employment relationships, for purposes of the Social Security Act 12

III. The lower courts' rulings will cause extreme confusion and difficulty in the implementation, by the State of Nebraska, of its obligations under the subject federal-state agreement on social security 15

Conclusion 17

CITATIONS

Page

CASES:

Bartels v. Birmingham, 332 U. S. 126 12

State of Nebraska v. Finch, 339 F. Supp. 528 (1972) 7

United States v. Silk, 331 U. S. 704 12

United States v. Webb, 397 U. S. 179 ..... 12, 13, 14

STATUTES:

28 U. S. C. §1254 (1) 3

42 U. S. C. 410, Sec. 210 of Social Security Act 5, 24

42 U. S. C. 418, Sec. 218 of Social Security Act 3, 4, 6, 10, 11, 22, 23, 24, 35, 37, 38

In The

Supreme Court of the United States

October Term, 1972

—o—

No. .....

—o—

STATE OF NEBRASKA, GUSTAVE R. LIESKE, Director of Administrative Services of the State of Nebraska, and FRANCES CHRISTENSEN, State Social Security Administrator of the State of Nebraska,

Petitioners,

vs.

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, and ROBERT M. BALL, Commissioner of Social Security of the United States Department of Health, Education and Welfare, and UNITED STATES OF AMERICA,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

The petitioners, State of Nebraska, et al., pray that the writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit rendered in these proceedings on October 21, 1972, and the November 27, 1972, order of said court denying the petitioners' motion for rehearing.

—o—

OPINIONS BELOW

I. *Eighth Circuit.* The judgment of the court below in this proceeding (Appendix A, infra, pp. 19 to 20), has not been reported as of the date of preparation of this petition.

The order of the court below denying the petitioners' application for rehearing (Appendix B, infra, pp. 20 to 21), is not reported.

The order of the court below granting petitioners' application for a recall of mandate, and for a stay of mandate pending application for a writ of certiorari (Appendix C, infra, pp. 21 to 22), was not reported.

II. *District Court.* The memorandum opinion of the District Court (Appendix D, infra, pp. 22 to 32), is reported at 339 F. Supp. 529. The judgment of the District Court (Appendix D(1), infra, p. 33), is not reported.

III. The ruling of the Secretary of Health, Education and Welfare, per the Commissioner of Social Security, is shown at Appendix F, infra, pp. 36 to 39.

(Note: In both the District Court and the Court of Appeals, this matter was consolidated, for briefs, arguments, and opinions with a similar matter, involving application of the subject agreement to justices of the peace and constables in the State of Nebraska. That matter is submitted to this Court in a separate petition for certiorari, and the official parties are the same as those before this Court in the present matter.)

———o———

BLEED THROUGH POOR COPY

JURISDICTION

The judgment of the Court of Appeals (Appendix A, infra, pp. 19 to 20), was entered on October 25, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1), and 42 U. S. C. § 418 (t) (1), of the Social Security Act. An application for rehearing was filed by the petitioners on November 20, 1972, which was denied per an unreported opinion on November 27, 1972. See, Appendix B, infra, at pp. 20 to 21.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The State of Nebraska entered into an agreement with the Federal Security Administrator which agreement became effective on June 20, 1951, and under which the parties agreed to the extension of Social Security benefits to certain employees of the State of Nebraska and its political and governmental subdivisions. The question before this Court is whether the State's statutory or constitutional control and right to control certain registrars of vital statistics, is sufficient, without actual routine control, to establish such persons as employees of the State of Nebraska.

STATUTORY PROVISIONS INVOLVED

Section 218 of the Social Security Act, as added per 64 Stat. 514, and as amended, 42 U. S. C. § 418, provides in pertinent part:

"(a) (1) The Secretary of Health, Education, and Welfare shall, at the request of any State, enter into an agreement with such State for the purpose of extending the insurance system established by this subchapter to services performed by individuals as employees of such State or any political subdivision thereof. Each such agreement shall contain such provisions, not inconsistent with the provisions of this section, as the State may request.

"* * *

"(b) For the purposes of this section—

(3) The term 'employee' includes an officer of a State or political subdivision.

"* * *

"(c) (3) Such agreement shall, if the State requests it, exclude (in the case of any coverage group) any one or more of the following:

(A) All services in any class or classes of (i) elective positions, (ii) part-time positions, or (iii) positions the compensation for which is on a fee basis;

(B) All services performed by individuals as members of a coverage group in positions covered by a retirement system on the date such agreement is made applicable to such coverage group, but only in the case of individuals who, on such date (or, if later, the date on which they first occupy such positions), are not eligible to

BLEED THROUGH POOR COPY

become members of such system and whose services in such positions have not already been included under such agreement pursuant to subsection (d) (3) of this section.

"* * *

"(t) (1) Notwithstanding any other provision of this subchapter any State, irrespective of the amount in controversy, may file, within two years after the mailing to such State of the notice of any decision by the Secretary pursuant to subsection (s) of this section affecting such State, or within such further time as the Secretary may allow, a civil action for a redetermination of the correctness of the assessment of the amount due, the disallowance of the claim for a refund or credit, or the allowance of the refund or credit, as the case may be, with respect to which the Secretary has rendered such decision. Such action shall be brought in the district court of the United States for the judicial district in which is located the capital of such State, or, if such action is brought by an instrumentality of two or more States, the principal office of such instrumentality. The judgment of the court shall be final, except that it shall be subject to review in the same manner as judgments of such court in other civil actions. Any action filed under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office."

Section 210 (k) of the Social Security Act, as added per 60 Stat. 979, and as amended, 42 U. S. C., § 410 (j) provides, in pertinent part:

"(j) The term 'employee' means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2) of this subsection) who performs services for remuneration for any person * * * if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term 'employee' under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed."

STATEMENT OF FACTS

The present matter arises out of a federal-state agreement on Social Security (Appendix F, infra, pp. 36 to 39), which was enacted pursuant to Section 218 of the Social Security Act. Under the provisions of the agreement, the State must make contributions in respect to the income of persons identified as follows:

"2. SERVICES COVERED. This agreement includes all services performed by individuals as employees of the State and as employees of those political subdivisions listed in the exhibit attached hereto, * * *."

BLEED THROUGH POOR COPY

Assessments, by the appellee Commissioner, in respect to the fee earnings of one class of alleged employees or officers of the State of Nebraska are before this court, which may be summarized as follows:

1. The Court of Appeals affirmed the District Court's order affirming the defendant Commissioner's January 30, 1967 ruling (Appendix E, infra, pp. 33 to 35), that the State of Nebraska was delinquent in failing to make Social Security contributions in respect to the fee income of one Clayton R. Ward, a justice of the peace in the City of Columbus, Nebraska, a city of the first class, for the years 1953 through January, 1955. See the District Court's opinion at *State of Nebraska v. Finch*, 339 F. Supp. 528 (1972).

Briefly stated, the justice of the peace is a minor judicial officer who is elected by the precinct, township, or city, to serve a district which is with one exception, coextensive with the county. The one exception is for the City of Omaha, which is a justice of the peace district, with the rest of the county constituting a separate justice of the peace district.

The office of justice of the peace, at times relevant hereto, was a constitutionally established office. Statutes defined the jurisdiction, duties and powers of the office. The justice of the peace collected and retained fees from litigants before him, and this was his only compensation. The justice of the peace also served as an officer of the township from which he was elected.

The justice of the peace served with only minimal contacts with any political entity. See generally, the

discussion by the District Court, at Appendix D, infra, pp. 22 to 32. The factors which the District Court considered to be most relevant were stated, 339 F. Supp., at 531, as follows:

> "* * *. It is * * *, the State of Nebraska which has constitutionally created the office of justice of the peace, determines the jurisdiction of the justice of the peace courts, and regulates the substitution of other courts for that of the justice of the peace. Further, the justice of the peace districts have been created by state statute, the oath of office is prescribed by statute, the execution of bond is prescribed by state statute, and, in several cases, the state or a political subdivision thereof provides office space to a justice of the peace. In view of the significant amount of control exercised over the office of justice of the peace by the State of Nebraska, I conclude that the office of justice of the peace is a state office and the person who fills that office is an officer of the State of Nebraska. Because the January 1, 1951, agreement specifically includes public officers within its terms, I conclude that the office of justice of the peace is within the terms of the agreement and the deficiency assessment by the Secretary was proper in all respects."

2. The Court of Appeals affirmed the District Court's order affirming the defendant Commissioner's January 30, 1967, ruling (Appendix E, infra, pp. 33 to 35), that the State of Nebraska was delinquent in failing to make Social Security contributions in respect to the fee income of one Lewis W. Ross, a constable of the Municipal Court of the City of Lincoln, Nebraska, for the period from April 15, 1958, until after September 13, 1960.

BLEED THROUGH POOR COPY

The District Court described the office of constable as follows (Appendix D, infra, pp. 22 to 32), 339 F. Supp., at 533-34:

> "Constables in Nebraska may be either elected or appointed, depending upon the size of the jurisdiction in which they serve. The primary duty of a constable is to serve the court which has appointed him, or the courts of the jurisdiction in which he is elected. Constables may serve process and may execute writs in criminal cases. Constables are not paid a salary but do receive fees for their services. * * *. It would appear from the statutes that the office of constable is similar to that of sheriff. Constables, like sheriffs, are ministerial officers in justices' courts. In view of the fact that the office of constable is created by statute, and the conduct of constables in fulfilling the duties of their office is closely regulated by statute, I believe the constable to be an officer of the State of Nebraska. In view of that conclusion it is clear that, like a justice of the peace, a constable is covered by the terms of the January 1, 1951, agreement and that the deficiency assessments of the Secretary were proper and should be upheld."

3. The Court of Appeals affirmed the District Court's order affirming the defendant Commissioner's October 19, 1967 ruling (Appendix E, infra, pp. 33 to 35), that the State of Nebraska was delinquent in failing to make Social Security contributions in respect to the fee income of one William R. Egenberger, a local registrar of vital statistics in the State of Nebraska, in respect to the fee income of all other local registrars of vital statistics in the State of Nebraska for the years 1962 and 1963.

The local registrar of vital statistics is appointed by the state registrar of vital statistics, under state stat-

ute, and his duties are defined by statute. He accepts birth and death certificates, and forwards them to the state registrar, for this service, the county pays him the fee of 50 cents. Statutes, as expanded by guidance from the state registrar, establish the form in which the state provided certificate forms are to be completed, but do not substantially direct the means or method by which the local registrar shall assure that the forms are so completed.

———o———

REASONS FOR GRANTING THE WRIT OF CERTIORARI

(Note: The petitioners herein shall be referred to collectively as the State.)

I.

The rulings below would interfere with the ability of the state statutorily to define its relationship to public contractors, in that to so define that relation would be to incur social security liability to the United States.

Pursuant to Sec. 218 of the Social Security Act, 42 U. S. C. §418 (relevant portions are provided at Statutory Provisions involved, supra, pp. 4 to 6), the State of Nebraska executed an agreement with federal officials to extend Social Security coverage to employees of "such State or any political subdivisions thereof" [42 U. S. C., §418(a)(1)]. 42 U. S. C., §418(b)(3) defines the term "employee" to include an officer (including an officer

BLEED THROUGH POOR COPY

who is compensated on a fee basis) of a State or a political subdivision thereof. It is the position of the State that the agreement, as described, does not apply to persons who have only a contractual and minimal relationship to the State.

A logical extension of the District Court's ruling would lead to the conclusion that a contractor whose contract is authorized and controlled by statute or a state administrator is a state employee, even though the officer may have a clear practical, continuing nexus to a political subdivision, and even though he would ordinarily be considered to be an independent contractor, under state common law rules. This is inconsistent with the clear intent of both the Agreement and with Sec. 218 of the Social Security Act, each of which contemplates that political subdivisions will have officers separate and apart from the State.

The State has unquestionable authority to authorize and regulate public contracts, with both the State and its political subdivisions. The District Court's ruling, however, could result in the attachment of Social Security consequences to the State's exercise of that inherent prerogative. We do not contend that such consequences should not arise where the State has statutorily defined a position in such manner that, under common law rules, the person is an employee. However, we submit that the mere statutory definition of a status, or the state supervision thereof, should not cause Social Security liability to attach to the State.

It is the position of the State of Nebraska that Social Security liability under the subject agreement should not

attach to mere public contracts, even where those contracts are closely controlled by statute. The employee should be expected to have a routine nexus to the employer. Under the rules approved by the courts below, the State of Nebraska is held to be the employer of local registrars of vital statistics—not because those persons have any practical relationship to the State but because of the technical fact that the State has statutorily defined their status and has directed an administrative officer to supervise their performance.

Without a practical nexus to the alleged employee, the State of Nebraska would have a virtually impossible burden of maintaining contact with, and administrative control over, the alleged employees who are within the scope of the lower courts' rules.

We submit that nothing in the Social Security Act suggests that Congress intended to extend Section 218 coverage in the manner it has been extended below.

II.

The rules established below to apply to public employment relationships are inconsistent with rules of this court, as stated in United States v. Webb, 397 U. S. 179, to apply to private employment relationships, for purposes of the Social Security Act.

In the private sector, federal authorities originally applied an "economic realities" test in identifying employees for Social Security purposes. See *United States v. Silk*, 331 U. S. 704; and *Bartels v. Birmingham*, 332 U. S. 126. This test was rejected by Public Law No. 642,

BLEED THROUGH POOR COPY

80th Congress, Second Session, 62 Stat. 438, in favor of a "common law rules" test. See *United States v. Webb*, 397 U. S. 179, 186-187:

> "The report of the Senate Finance Committee on the resolution makes clear a congressional purpose to disapprove the proposed regulation and to reaffirm that determinations of employee status were to be based on the traditional legal tests. The Committee seems to have thought that the Silk and Bartels decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: 'But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.' Id., at 2.
>
> "The causes of congressional dissatisfaction with the proposed regulation were twofold. As a fiscal matter, the Committee cited testimony that the new regulation would extend social security benefits to between 500,000 and 750,000 new workers, who had not been covered previously and had not contributed to the trust fund from which benefits would be paid, thus endangering the integrity of the fund. More generally, the Committee was fearful of the uncertainty that would be created by the new regulation, and the discretion it would give to the executive agencies in determining the applicability of the statutes. The report stated:
>
> " 'In a word, by unbounded and shifting criteria, [the proposed regulation] would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act

> any person whom they might decide to be, or might decide not to be, an "employee"; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an "employer."' "

The term "employee" for purposes of Social Security applicability in the private sector, therefore, is limited to those persons who have a real relationship to the "employer," a relationship which is represented by the common law rules of employment. The rulings below extend state coverage, beyond true public employment relationships, to all personal service relationships which are bottomed in statutes. This highly technical definition of the term "employee" is inconsistent with the practical, common law test which is applicable in the private sector.

To extend liability for Social Security contributions as the District Court has done would raise those very evils listed in *Webb, supra.* The cost of such contributions will drastically increase the liability of the State of Nebraska, and the concomitant liability of the United States to Social Security beneficiaries will surpass that liability which Congress clearly intended the United States to assume. Such coverage will be extended to persons having only minimal contacts with the State.

These objections have been persuasive with Congress, and this Court, as quoted above from *Webb*, and should be persuasive to restrict the subject intrusion, by the Commissioner, into those public relationships which are uniquely the province of the State.

BLEED THROUGH POOR COPY

III.

The lower courts' rulings will cause extreme confusion and difficulty in the implementation, by the State of Nebraska, of its obligations under the subject federal-state agreement on social security.

Under the rulings of the courts below, the State of Nebraska must treat as an employee, for Social Security purposes, persons who have incidental, part-time relationships to the State of Nebraska, because the State of Nebraska has found it to be appropriate to define that relationship by statute. Here, the position of local registrar of vital statistics was involved, but the State finds it often necessary statutorily to provide for public contracts, and the status of all public contracts will be uncertain if the lower courts' rulings are permitted to stand.

Here, the state registrar of vital statistics is authorized to appoint local registrars, under certain statutory conditions, to perform certain largely ministerial functions in the collection of vital statistics documents. In essence, the State believes that these persons are contractors, not employees, in that, under common law rules, they seem more nearly to be within the former category.

If, as the District Court seems to say, a position defined by statute is necessarily a state employee, then it would seem to follow that all contractors with local political subdivisions are state contractors to the extent that the procedural or substantive provisions of such public contracts are established by statute. If that is true, then

the State would not even be entitled to recover, from the political subdivision, the employer's share of the contribution. To follow this logic would require extensive modification of the existing system for reporting and collecting Social Security contributions. Further, of course, the State would incur vast liabilities which it has heretofore delegated to local entities, to the jeopardy of its capacity to finance discretionary state expenses.

The Commissioner would attempt to argue that the subject rulings do not attempt to assess ultimate liability, that they assess only the immediate liability. That is not, however, true. Those rulings determine the employment status which must be equated with ultimate liability for contributions. The State believes that if more practical common sense approach were followed, no liability whatever would arise in respect to the position of local registrar of vital statistics.

In any event the State's liability under the subject rules would be in uncertainty until further rulings of the Commissioner, and the Courts, can be made. This administrative uncertainty will jeopardize state fiscal planning into the uncertain future.

Further, the subject rulings raise the possibility that many marginal persons may be deemed, by the Commissioner, to be State contractors. For example, fishing permit vendors are appointed (with bonds), to sell fishing permits locally. Retail vendors of fishing equipment, service station operators, etc., request to sell such permits, and are automatically authorized to do so. They retain a portion of the permit fees collected, and are generally controlled by statute in respect to certain of their acts.

BLEED THROUGH POOR COPY

If statutory authorization and control, with limited administrative supervision are the criteria of employment, as determined by the courts below, then permit vendors might well be deemed to be state employees. However, if the common law rules, including routine control of methods of operation, are the criteria, as the State believes, then clearly, these vendors are not state employees.

We do not attempt here to suggest that the Court should hope to make a definition of the term "employee" which would be applicable to all possible future cases. We do, however, submit that the rules adopted by the District Court, and approved by the Court of Appeals, are broader than the present matter would require, and that this overbreadth will cause unnecessary administrative problems, not only to the State of Nebraska, but to all other states operating under similar federal-state agreements. We believe further, that when the Court looks beyond the statutory source of the present positions, it will recognize that the present positions have neither official nor employment relationships to the State of Nebraska, for purposes of the Social Security Act.

———o———

CONCLUSION

The petitioner, State of Nebraska, has not attempted to argue, at length, those rules which are considered to be applicable in defining the public employer-employee relationships to which Social Security consequences should attach under the subject agreement. The State of Ne-

braska would consider such discussion properly left to the briefs-in-chief which would be filed should the writ of certiorari issue herein. The State of Nebraska does, however, wish to convey to the Court that sense of concern which it holds toward the rules adopted by the District Court, and approved by the Court of Appeals for the Eighth Circuit. The State of Nebraska believes, very urgently, that the present matter is entirely appropriate for review by this Court.

The petitioners, State of Nebraska, et al., therefore pray that this Court grant the writ of certiorari herein, and hear this matter in consolidation with another matter simultaneously filed herewith, by these petitioners, against the United States, involving coverage of justices of the peace and constables under the subject agreement, and which other matter was consolidated with the present matter in each of the courts below. The petitioners ask that the Court may review the matters decided below and establish a proper basis for the continued application of the Social Security Act to public employees.

Respectfully submitted,

CLARENCE A. H. MEYER
Attorney General of Nebraska,

MELVIN K. KAMMERLOHR
Assistant Attorney General

State Capitol Building
Room 2119
Lincoln, Nebraska 68509
(402) 471-2211

Counsel for Petitioners.

BLEED THROUGH POOR COPY

APPENDIX A

Judgment of the United States Court of Appeals
For the Eighth Circuit

No. 72-1247 September Term, 1972
State of Nebraska, Robert P. Rogers, Director of Administrative Services of the State of Nebraska, and Robert F. Yeager, State Social Security Administrator of the State of Nebraska,

Appellants,

vs.

Elliot L. Richardson, United States Secretary of Health, Education and Welfare; and Robert M. Ball, Commissioner of Social Security of the United States Department of Health, Education and Welfare, and United States of America,

Appellees.

No. 72-1248
State of Nebraska, Robert D. McManus, Director of Administrative Services of the State of Nebraska, and Robert F. Yeager, State Social Security Administrator of the State of Nebraska,

Appellants,

vs.

Elliot L. Richardson, Secretary of Health, Education and Welfare and Robert M. Ball, Commissioner of Social Security of the United States Department of Health, Education and Welfare, and United States of America,

Appellees.

Appeals from the United States District Court for the District of Nebraska.

These causes came on to be heard on the record from the United States District Court for the District of Nebraska and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in these causes, be, and the same is hereby, affirmed.

October 25, 1972

APPENDIX B

Order of the United States Court of Appeals for the Eighth Circuit Overruling the Petition for Rehearing

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1247 September Term, 1972

State of Nebraska, et al.,

Appellants.

vs.

Elliott L. Richardson, United States Secretary of Health, Education and Welfare, et al.,

Appellees.

No. 72-1248

State of Nebraska, et al.,

Appellants.

vs.

Elliott L. Richardson, United States Secretary of Health, Education and Welfare, et al.,

Appellees.

BLEED THROUGH POOR COPY

Appeals from the United States District Court
for the District of Nebraska

The Court having considered petition for rehearing filed by counsel for appellants, it is now here ordered that the same be, and it is hereby, denied.

November 28, 1972

APPENDIX C

Order of Court of Appeals Recalling Mandate
and Staying Same

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1247 September Term, 1972

State of Nebraska, Robert P. Rogers, et al.,

Appellants,

vs.

Elliot L. Richardson, United States Secretary of Health, Education and Welfare, et al.,

Appellees.

No. 72-1248

State of Nebraska, Robert D. McManus, Director of Administrative Services of State of Nebraska, et al.,

Appellants,

vs.

Elliot L. Richardson, et al.,

Appellees.

Appeals from the United States District Court
for the District of Nebraska

Motion of appellants for a recall and stay of the issuance of the mandate of this Court heretofore issued to the District Court having been considered by this Court, it is now here ordered that the mandate be recalled and the Clerk of the United States District Court for the District of Nebraska is hereby directed to return the mandate to the office of the Clerk of this Court.

It is further ordered by this Court that the issuance of the mandate be and will be stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

December 27, 1972

APPENDIX D

Opinion of the U. S. District Court for the District of Nebraska

MEMORANDUM OF DECISION

URBOM, Chief Judge.

[1] The State of Nebraska has sought, pursuant to 42 U. S. C. A. § 418 (t) (1), judicial review of a number of deficiency assessments levied against the State of Nebraska by the Secretary of Health, Education and Welfare for contributions due from the state under an agreement between the state and the Secretary which was effective January 1, 1951. The contract, authorized by 42 U. S. C. A. § 418 (a) (1), brought under the terms of the Social Security Act employees and public officials of the State of Nebraska. During the contract period the State of Nebraska did not make contributions for wages earned

BLEED THROUGH POOR COPY

by justices of the peace, city constables, and registrars of vital statistics. On December 3, 1964, the Secretary of Health, Education and Welfare notified the State of Nebraska that it was being assessed for contributions due under the agreement for wages earned by Clayton R. Ward, a justice of the peace, and Lewis W. Ross, a constable in the City of Lincoln. The deficiency due for Ross totaled $190.40; for Ward, $165.88. Through four letters dated April 15, 1965, J. L. Fay notified the State of Nebraska that further deficiencies were being assessed for contributions due on the salaries for all constable positions in the City of Lincoln, the City of Omaha, and throughout the State of Nebraska; the fourth letter assessed a deficiency for contributions due on salaries earned by all justices of the peace in the State of Nebraska during the period January 1, 1951, through September 13, 1960. The State of Nebraska sought review by the Secretary for deficiencies assessed on December 3, 1964; no review was sought of the deficiencies assessed on April 15, 1965. Because review by the Secretary is a jurisdictional requirement for review by this court, only those deficiencies assessed on December 3, 1964, are properly subject to review by this court under the terms of 42 U. S. C. A. § 418 (t) (1). These assessments are the subject of State v. Finch, Civ. 1468 L.

The subject matter of State v. Richardson, Civ. 1596 L, consolidated with State v. Finch, is deficiencies reviewed by the Secretary: (1) on April 13, 1965, the State of Nebraska was notified that a deficiency was being assessed in the amount of $129.11 for contributions due on salaries earned by William R. Egenberger, a registrar of vital statistics in Dawson County, Nebraska, and covered fees paid Egenberger for his services through September 13, 1960; (2) on April 15, 1966, an additional deficiency was assessed for contributions due on remuneration received for services by other registrars of vital statistics in the State of Nebraska during the year 1962; and (3) a letter dated April 17, 1967, assessed deficiencies for contributions due on salaries earned by registrars of

vital statistics in the State of Nebraska during the calendar year 1963. The Secretary concluded that the deficiencies were correctly assessed. Because the state has complied fully with the requirements of 42 U. S. C. A. § 418 (t) (1), these assessments reviewed by the Secretary are properly subject to review by this court.

Defendants' exhibit 1, a copy of the agreement between the State of Nebraska and the Federal Security Administrator, extends the benefits conferred by Title II of the Social Security Act to services performed by individuals as employees of the State of Nebraska. The contract contains the following pertinent provisions:

> "1. DEFINITIONS. For the purposes of this agreement the parties adopt the definition of terms as set forth in Section 218 of the Social Security Act; and, the term 'employee' shall mean an employee as defined in Section 210 (k) of said act and *shall include an officer of the state or of a political subdivision thereof.* (Emphasis added.)
>
> "2. SERVICES COVERED. This agreement includes all services performed by individuals as employees of the state and as employees of those political subdivisions listed in the appendix attached hereto, . . . it being the understanding of the parties that it is the intention of the State of Nebraska to provide coverage for its employees and for the employees of those political subdivisions which join with the state, on as broad a basis as is permitted under the Social Security Act."

The state excluded only those employees who would be covered by Social Security in the absence of the agreement, employees already covered by a retirement system, and those services which are specifically excluded under the Social Security Act. It was available to the state, if it so chose, to exclude employees whose remuneration was on a fee basis. Tit. 42 U. S. C. § 418 (c) (3) (A) (iii) provides that:

BLEED THROUGH POOR COPY

> "Such agreement shall, if the State requests it, exclude [in the case of any coverage group] any one or more of the following: . . . positions the compensation for which is on a fee basis."

The state did not choose to avail itself of this exclusion. By agreement approved April 6, 1962, the original contract was modified to exclude the services of individuals as justices of the peace and constables, the compensation for which is on a fee basis, from coverage groups included under the original agreement. This modification did not include registrars of vital statistics; however, the Secretary assessed deficiencies for William Egenberger only up to the date of September 13, 1960, the effective date of the modification to the original agreement.

Because in its original agreement with the Secretary the state chose to cover the broadest category of employees who could be covered within the terms of 42 U. S. C. A. § 418, it is apparent that if the three positions at issue in these two cases are, under Nebraska law, either employees or officers of the State of Nebraska, they are covered by the agreement of January 1, 1951, and the deficiency assessments must be upheld.

JUSTICES OF THE PEACE

[2] Clayton R. Ward served as justice of the peace in Platte County, Nebraska, from early 1953 until approximately March 31, 1955. During that period he earned $4,468.00. This amount was not paid as wages, but was the total of all fees collected by him in his capacity as justice of the peace. In reviewing the deficiencies assessed against the State of Nebraska for contributions due on Mr. Ward's earnings during this period, the Secretary found that justices of the peace are public officers under Nebraska law. A justice of the peace is a constitutional officer in Nebraska. The office is created by Article V, Section 1, of the State Constitution. See, State ex rel. Woolsey v. Morgan, 138 Neb. 635, 294 N. W.

436 (1950). It is the position of the State of Nebraska that because Article V, Section 18, of the Constitution of the State of Nebraska provides that justices of the peace be elected by district, the justice of the peace is an officer of the district within which he is elected, rather than an officer of the state. The boundaries of justice of the peace districts, although usually coterminous with county lines, are not uniformly so. However, I am not persuaded that merely because a justice of the peace is elected from within a district he is necessarily an officer of that district. It is apparent that the State of Nebraska exercises a considerable degree of control over the office of justice of the peace. Article V, Section 18, of the Nebraska Constitution grants to the state the power to create justice of the peace districts and to substitute other courts for the justice of the peace courts. State ex rel. Bunce v. Kubat, 110 Neb. 362, 193 N. W. 754 (1923). This control extends to determining the jurisdiction of justice of the peace courts. Bunce v. Kubat, supra. In addition, several statutes of the State of Nebraska regulate practice in the courts of justices of the peace. See, Conkling v. DeLany, 167 Neb. 4, 91 N. W. 2d 250 (1958). It is the duty of the justice of the peace to administer the laws of the State of Nebraska. Their practice is to be uniform throughout the state, and no significant difference in their practice is predicated on the fact that each is elected from a separate justice of the peace district. Bunce v. Kubat, supra.

The fact that a justice of the peace is elected from the district which may not coincide with county lines does not necessarily make a justice of the peace an officer of that district. A justice of the peace is not unique in the fact that he is elected by district. For example, a representative to the Congress of the United States is elected by district in Nebraska and that district may not coincide with any other boundary in the state. It is, however, clear that a representative to the Congress of the United States is an officer of the United States, not an officer of the district in which he was elected.

BLEED THROUGH POOR COPY

The section of the Constitution of the State of Nebraska which creates the office of justice of the peace also provides for the creation of all other courts in Nebraska. There is nothing to distinguish the office of justice of the peace from other judicial offices created by Article V, Section 1, except that the jurisdiction of the justice of the peace court is specifically set forth in Article V, Section 18. Although the state has the power to substitute other courts for the justice of the peace court, the court so created must retain the same jurisdiction as did the justice of the peace court which is abolished by the substitution. State ex rel. Woolsey v. Morgan, 138 Neb. 635, 294 N. W. 436 (1940). It is then the State of Nebraska which has constitutionally created the office of justice of the peace, determines the jurisdiction of the justice of the peace courts, and regulates the substitution of other courts for that of the justice of the peace. Further, the justice of the peace districts have been created by state statute, the oath of office is prescribed by statute, the execution of a bond is prescribed by state statute, and, in several cases, the state or a political subdivision thereof provides office space to a justice of the peace. In view of the significant amount of control exercised over the office of justice of the peace by the State of Nebraska, I conclude that the office of justice of the peace is a state office and the person who fills that office is an officer of the State of Nebraska. Because the January 1, 1951, agreement specifically includes public officers within its terms, I conclude that the office of justice of the peace is within the terms of the agreement and the deficiency assessment by the Secretary was proper in all respects.

REGISTRARS OF VITAL STATISTICS

[3] As noted earlier, deficiency assessments were entered by the Secretary for contributions due from the state on salaries earned by local registrars of vital statistics. In Nebraska local registrars of vital statistics are appointed by the state registrar of vital statistics,

as authorized by § 71-602, R. R. S. Neb. 1943. The duties of local registrars are set out in §§ 71-604 to 71-608, R. R. S. Neb. 1943. Section 71-602 grants to the Department of Health the power to appoint municipal or county clerks as local registrars. Local registrars hold office during the pleasure of the Department of Health. It is the duty of local registrars to accept for filing all birth and death certificates. By statute they must forward to the Department of Health all certificates filed with them during the preceding month. The Department of Health supplies all necessary blanks, forms and instructions to the local registrars. The registrar is entitled to a fee of 50¢ for each certificate or report filed by him, with the fee to be paid by the county for which the certificate or report is made. Plaintiffs' Exhibit B, the deposition of Freda Theis, the Director of the Bureau of Vital Statistics of the State of Nebraska, is instructive as to the manner in which the duties of local registrars are supervised by the State of Nebraska. As earlier noted, the local registrar is appointed by the director of the Department of Health. In most cases either the county clerk or municipal clerk is appointed. The qualifications of the registrar are set by statute. The appointment is made at the discretion of the director and an individual appointed may be removed from that position by the director. Although the statute directs that all certificates filed by the local registrar shall be forwarded to the director by the 5th of each month, in practice they are generally forwarded more frequently. On a quarterly basis the bureau of vital statistics certifies to the county the number of certificates filed by the local registrar of vital statistics. The county on the basis of this certification pays to the registrar the sum of 50¢ for each certificate filed. To the knowledge of the director no payments were ever made directly from the office of the director of the bureau of vital statistics. Local registrars call on the director of the bureau of vital statistics when they have questions regarding the filing of certificates and the director occasionally does call

BLEED THROUGH POOR COPY

on registrars in the exercise of her supervisory capacity. In 1966 the bureau of vital statistics issued a manual entitled, "Manual of Instructions for County Registrars." This manual is sent to each of the local registrars. The instruction booklet is intended for the guidance of local registrars and they are expected to comply with the instructions contained in the booklet. For the reasons which follow, I conclude that local registrars of vital statistics are employees of the State of Nebraska and are therefore subject to the agreement of January 1, 1951, and are not excluded from coverage by the modification to the agreement which became effective on September 13, 1960.

In arriving at my determination that a local registrar of vital statistics is an employee of the State of Nebraska, I find the following language of Gardner v. Kothe, 172 Neb. 364, 109 N. W. 2d 405 (1961), to be instructive:

> "The primary test in determining whether the relationship of employer-employee exists is whether the alleged employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be done as well as the result which is to be accomplished. . . 'The test usually invoked in this state is whether the alleged employer has the control of the workman and the details, mode and manner of doing the work. . . . Generally most courts agree that the main test is the right of control, and that right, in the actual exercise of that control governs. . . Other factors are looked to only to aid in determining whether such relationship existed in a given case.'" 172 Neb. at 366, 109 N. W. 2d at 408.

The State of Nebraska contends that the registrar of vital statistics is an independent contractor under Nebraska law. This contention, I think, is negatived by the following language from *Gardner*:

> "An independent contractor, generally, is one who contracts to do a piece of work according to his own methods and is not subject to the control of the other contracting party except as to the result of the work." 172 Neb. at 366, 109 N. W. 2d at 408.

Although some elements of a contractual relationship may exist which would indicate that the local registrar of vital statistics is indeed an independent contractor, it would also appear that the State of Nebraska, through the bureau of vital statistics, exercises a significant degree of control over the manner in which the local registrar of vital statistics performs his functions. Specifically, the director of the bureau of vital statistics issues a manual which governs the manner in which the functions of the local registrar of vital statistics are performed; a local registrar is subject to removal from his position by the director of the Department of Health; the registrar is subject to supervision of the director, and such supervision is regularly exercised; and all forms and blanks to be used by the registrar are supplied to him by the State of Nebraska. Again turning to the language of Gardner v. Kothe, the court there said in answer to a contention that because the plaintiff was paid on a piecework basis he was not an employee:

> "The payment of wages on a piece-rate basis is not inconsistent with the status of an employee. Riggins v. Lincoln Tent & Awning Co., 143 Neb. 893, 11 N. W. 2d 810. The fact that Noble did not deduct withholding taxes or social security from the amounts paid to plaintiff is evidence that tends to negative a finding that the plaintiff was an employee but it is not conclusive.
>
> "The fact that the plaintiff received the same rate as Noble did under the contract with the defendant is explained at least in part, by the fact that it was the going rate for the work the plaintiff performed. . .

BLEED THROUGH POOR COPY

"Upon a review of the evidence de novo, we hold that the evidence establishes that the plaintiff was an employee of George L. Noble at the time the accident happened." 172 Neb. at 368, 109 N. W. 2d at 408.

Because each of the factors relied upon by the Supreme Court of Nebraska in finding that Gardner was an employee exists in the present case with regard to the relationship between local registrars of vital statistics and the director of the bureau of vital statistics, I hold that local registrars of vital statistics are employees of the State of Nebraska and that the deficiencies assessed respectively on April 13, 1965, April 15, 1966, and April 17, 1967, were proper and the Secretary must be affirmed.

CONSTABLES

[4] At the time that the State of Nebraska was notified that deficiencies had been assessed with respect to justices of the peace, it was also informed that deficiencies had been assessed with respect to constables in the City of Lincoln, the City of Omaha, and all other constables in the State of Nebraska. A notice dated December 3, 1964, assessed a deficiency for contributions due on sums earned by Lewis W. Ross, a constable for the City of Lincoln, Nebraska. A deficiency of $190.49, representing contributions due on earnings of $3,635.34, was assessed by that letter and subsequently upheld on review by the Secretary. I conclude that, as in the case of justices of the peace, Lewis W. Ross is an officer of the State of Nebraska.

Constables in Nebraska may be either elected or appointed, depending upon the size of the jurisdiction in which they serve. The primary duty of a constable is to serve the court which has appointed him, or the courts of the jurisdiction in which he is elected. Constables may serve process and may execute writs in criminal cases. Constables are not paid a salary but do receive fees for their services. The fees are paid

directly by those who request the services of the constable; if the service is rendered to the court, the fee is paid by that court. The authority of the constable is derived from statute. In the case of Ross, he was appointed by and served at the discretion of Municipal Judge Richard O. Johnson. Ross' primary duties consisted of serving papers for the court, and from time to time he served as bailiff. He was paid a small salary for his services as bailiff; his services as constable were paid only by fees earned in an amount fixed by state statute. It would appear that the services of Ross were not restricted to Judge Johnson; he apparently served each of the other two municipal judges, both as constable and as bailiff. Plaintiffs' Exhibit E, the deposition of Judge Johnson, indicates clearly that Ross was subject to the supervision of Judge Johnson in the manner in which he performed his duties as constable. It would appear from the statutes that the office of constable is similar to that of sheriff. Constables, like sheriffs, are ministerial officers in justices' courts. In view of the fact that the office of constable is created by statute, and the conduct of constables in fulfilling the duties of their office is closely regulated by statute, I believe the constable to be an officer of the State of Nebraska. In view of that conclusion it is clear that, like a justice of the peace, a constable is covered by the terms of the January 1, 1951, agreement and that the deficiency assessments of the Secretary were proper and should be upheld.

Those deficiency assessments which were presented to the Secretary for review and are therefore properly before this court were proper in all respects and should be upheld.

An appropriate order will be entered this day.

APPENDIX D (1)

Judgment of the District Court

(Filed March 2, 1972)

In accordance with the accompanying memorandum of decision,

It hereby is adjudged and ordered that the decisions and assessments by the Secretary of Health, Education and Welfare against the State of Nebraska regarding the deficiencies in contributions due on the earnings of William R. Egenberger and all other registrars of vital statistics are affirmed, judgment is entered for the defendants, and the action is dismissed on the merits.

Dated February 29, 1972.

BY THE COURT

/s/ Warren K. Urbom
Chief Judge

APPENDIX E

Ruling of Commissioner of Social Security,
Acting Pursuant to Authority Delegated by
the Secretary of Health, Education and Welfare

Social Security Administration
Baltimore, Maryland 21235

Office of the Commissioner

Refer to: RSI:CC
October 19, 1967

AIRMAIL — CERTIFIED

Honorable Clarence A. H. Meyer
Attorney General
State of Nebraska
Lincoln, Nebraska 68509

Dear Mr. Attorney General:

Your letters of June 24, 1965, May 11, 1966, and July 6, 1967, requested review, pursuant to Section 218(s) of the Social Security Act, of the assessments made in the case of Mr. William R. Engenberger, account number 505-36-9813, and of the assessments made with respect to contributions due on remuneration received for services of other registrars of vital statistics in Nebraska during 1962 and 1963. These assessments were based on the Administration's determination that the services of Mr. Engenberger and all other registrars of vital statistics in Nebraska were performed in an employment relationship with the State and were covered under the terms of the State's section 218 coverage agreement. It is the State's view that registrars of vital statistics are not employees for purposes of social security coverage because they are subject to insufficient control over the manner and method of performing their duties to be employees under the usual common-law rules for determining an employer-employee relationship.

The requested review of these assessments has been made by me pursuant to authority delegated by the Secretary. The evidence submitted in this matter shows that Mr. Engenberger and the other registrars of vital statistics in Nebraska all perform their services under substantially similar conditions. They were appointed by the State Department of Health and serve during the pleasure of the Department. The State furnished each registrar with a Manual of Instructions for County Registrars which advises in part that: "The county registrar, subject to the direction and supervision of the Bureau of Vital Statistics, is responsible for registration of all births, deaths and fetal deaths (stillbirths) in his registration area." In addition, the Director of the Bureau visits local registrars occasionally and they are furnished periodic letters of instructions or advice. They are compensated for their services by fees paid by the county in which they serve.

I have concluded upon review that registrars of vital statistics in Nebraska are public officers and as such they are employees for social security purposes under the terms of the agreement between the State of Nebraska and the Secretary of Health, Education, and Welfare by which coverage was extended to the services of employees of the State and its political subdivisions and Section 218 (b) (3) of the Social Security Act, as amended. In addition, I have concluded that the State did by means of the statutes which define the duties and powers of local registrars and by means of written instructions furnished them, effectively reserve to itself the right to control and direct the activities of registrars of vital statistics to a degree sufficient to establish the existence of an employer-employee relationship under the usual common-law rules. Further, I have concluded that the fees received by the local registrars constituted remuneration for employment and thus were wages for social security purposes. On the basis of these findings, the above-mentioned assessments are affirmed.

If the State disagrees with this decision, it may file a civil action in the United States District Court for the district in which is located the State capitol for a redetermination of the correctness of the assessments made in this case. If the State wishes to file such action, it must do so within two years from the date this letter is mailed.

Sincerely yours,

/s/ Robert M. Ball
Commissioner of Social Security

APPENDIX F

The Nebraska State Social Security Agreement

The Federal Security Administrator, hereinafter called the Administrator, and the State of Nebraska, hereby agree, in accordance with the terms and conditions stated in this agreement, to extend, in conformity with section 218 of the Social Security Act, the insurance system established by title II of the Social Security Act, to services performed by individauls as employees of the State and as employees of those political subdivisions of the State listed in the appendix attached hereto and made a part hereof, except services expressly excluded from this agreement.

1. DEFINITIONS. For the purposes of this agreement the parties adopt the definition of terms as set forth in section 218 of the Social Security Act; and, the term "employee" shall mean an employee as defined in section 210 (k) of said Act and shall include an officer of the State or of a political subdivision thereof.

2. SERVICES COVERED. This agreement includes all services performed by individuals as employees of the State and as employees of those political subdivisions listed in the appendix attached hereto, except

(a) service which in the absence of this agreement would constitute employment as defined in the Social Security Act; or,

(b) service performed by an employee in a position which on the date of this agreement or of any modification thereof, is covered by a retirement system; or,

(c) any other service which under the Social Security Act may not be included in an agreement between the State and the Federal Security Administrator;

BLEED THROUGH, POOR COPY

it being the understanding of the parties that it is the intention of the State of Nebraska to provide coverage for its employees and for the employees of those political subdivisions which join with the State, on as broad a basis as is permitted under the Social Security Act.

3. CONTRIBUTIONS BY THE STATE. The State will pay to the Secretary of the Treasury, at such time or times as the Administrator may by regulation prescribe, amounts equivalent to the sum of the taxes which would be imposed by sections 1400 and 1410 of the Internal Revenue Code if the services of employees covered by this agreement constituted employment as defined in section 1426 of such code.

4. COMPLIANCE WITH REGULATIONS. The State will comply with such regulations as the Administrator may prescribe to carry out the purposes of section 218 of the Social Security Act.

5. MODIFICATION. This agreement may be modified in accordance with the provisions of Section 218 (c) (4) of the Social Security Act.

6. TERMINATION. This agreement may be terminated in accordance with the provisions of Section 218 (g) of the Social Security Act.

7. ADJUSTMENTS, REFUNDS, AND INTEREST ON DELINQUENT PAYMENTS.

(a) If more or less than the correct amount due under Paragraph 3 of this agreement is paid with respect to any payment of remuneration, proper adjustments with respect to the amounts due under such Paragraph 3 shall be made, without interest, upon such conditions, in such manner, and at such times, as may be prescribed by regulation of the Administrator. If an overpayment cannot be adjusted under this subparagraph, refund shall be

made in accordance with section 218 (h) (3) of the Social Security Act,

(b) If the State does not make, at the time or times due, the payments provided for under this agreement, there shall be added, as part of the amounts due (except in the case of adjustments made in accordance with the provisions of subparagraph (a) of this paragraph), interest at the rate of six per centum per annum from the date due until paid, and without prejudice to other available methods of collection, the Administrator, in his discretion, may deduct such amounts plus interest from any amounts, now or hereafter provided, which he may certify to the Secretary of the Social Security Act. Amounts so deducted shall be deemed to have been paid to the State under such provision of the Social Security Act.

8. BENEFITS. The Administrator agrees that benefits will be provided for employees whose services are covered by the agreement, and their dependents and survivors, on the same basis as though such services constituted employment within the meaning of title II of the Social Security Act.

9. EFFECTIVE DATE. This agreement shall be effective as of January 1, 1951.

THIS AGREEMENT is entered into this 20th day of June, 1951, by W. L. Mitchell, Acting Commissioner for Social Security, pursuant to section 218 of the Social Security Act, acting herein by virtue of authority vested in him by Oscar R. Ewing, Federal Security Administrator, in Federal Security Agency Order 9 dated March 8, 1951, and the State of Nebraska, acting herein through Philip K. Johnson, Tax Commissioner of the State of

BLEED THROUGH POOR COPY

Nebraska, by virtue of the authority granted by Legislative Bill 265 of the Sixty-Second Session of the Legislature of the State of Nebraska .

Oscar R. Ewing,
Federal Security Administrator

By: /s/ W. L. Mitchell
Acting Commissioner for Social Security

/s/ Philip K. Johnson
Tax Commissioner,
State of Nebraska

APPROVED JUNE 11th, 1951:

/s/Val Peterson
Governor, The State of Nebraska

(NOTE: The Appendix to the Agreement is irrelevant to this proceeding, and is therefore omitted.)